No. 14397.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MOTORES DE MEXICALI, S. A., a corporation,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, *Appellee*, and E. A. LYNCH, Trustee of the Estate of Erbel, Inc., doing busines as Bi-Rite Auto Sales, Bankrupt.

APPELLANT'S OPENING BRIEF.

ERNEST R. UTLEY,
417 South Hill Street,
Los Angeles 13, California,
Attorney for Appellant.

Parker & Sun, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 14397.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MOTORES DE MEXICALI, S. A., a corporation,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, *Appellee,* and E. A. LYNCH, Trustee of the Estate of Erbel, Inc., doing busines as Bi-Rite Auto Sales, Bankrupt.

APPELLANT'S OPENING BRIEF.

Introductory Statement.

This is an appeal from the order and judgment of the Court made and entered on April 29, 1954, adopting and affirming the order of the Referee in Bankruptcy made and entered in this reclamation proceeding on January 27, 1954, and denying the petition of Motores de Mexicali, S. A. for a review of the aforesaid order of the Referee.

This appeal attacks only that part of the Referee's order which awards and orders payment to the Bank of America National Trust & Savings Association of the sum of $8,262.87. This contest is one between Motores and the Bank, the Trustee is not a party to this appeal.

For convenience, the above named Bank will be hereafter referred to as "the bank" and at all times herein same will refer to the Wilshire-LaBrea Branch; appellant Motores de Mexicali, S. A. will be referred to as "Motores," and the Trustee in Bankruptcy as "trustee." Erbel, Inc. etc. will be referred to as "the bankrupt."

The transaction giving rise to the contest between the appellant and the bank was handled by the officials and employees of the bank in charge of the loan and collection departments of its Wilshire-LaBrea Branch. It is appellant's position that the transaction was handled by them negligently; that their negligent conduct was conducive to the perpetration of the fraud by the bankrupt on the appellant as alleged in appellant's cross-petition [R. 14-29]; that under Section 3543 of the California Civil Code as construed by the California decisions the bank "must be the sufferer"; that its asserted lien as alleged in its reclamation petition [R. 7-12] is void against appellant, *and the bank was estopped from disputing or denying appellant's title to the automobiles involved herein.*

Pleadings.

The bank's reclamation petition [R. 7-12] alleges in substance as follows:

1. That prior to bankruptcy the bankrupt executed and delivered to the bank trust receipt certificates covering the automobiles described in Schedule A attached to the petition [R. 7], and that the balance owing to the bank under these trust receipt certificates was the sum of $23,363.00 [R. 8].

2. That prior to bankruptcy the bankrupt also executed and delivered to the bank trust receipt certificates

covering the seven automobiles described in Schedule B attached to the petition, and that these seven automobiles were sold by the trustee for the sum of $6,599.00 [R. 8-9].

The reclamation petition prayed for an order directing the trustee to deliver to the bank the automobiles described in Schedule A and to remit to the bank the sale proceeds of the seven automobiles described in Schedule B in the above stated amount of $6,599.00 [R. 10-11].

The cross-petition of Motores [R. 14-29] alleges in substance as follows:

1. That five of the automobiles covered by the bank's trust receipt certificates were the property of Motores, and that the bank's lien under its trust receipt certificates was void against Motores [R. 14-16].

2. That prior to bankruptcy an executory sales and purchase agreement was made between the appellant and the bankrupt under which the bankrupt agreed to purchase the five automobiles in question and to pay the purchase price thereof *in cash* [R. 18-19, 21-22].

3. That at the time of the sale the bankrupt gave to Motores five automobile purchase money drafts [Exs. A, B, C, D, E] *payable through the bank,* each labeled "purchase money draft" and each specifying the automobile sold and its purchase price [R. 19-20, 22-24].

4. That the five drafts were taken by Motores as conditional payment; that they were duly presented by Motores for payment in due course to the bank; that payment of said drafts was dishonored; that due to its insolvency the bankrupt was financially unable to meet payment of the drafts; *that the drafts were all worthless,*

and that Motores was an unpaid seller under Section 1772 of the California Civil Code [R. 20-21, 24-25].

5. That at the time of the sale the bankrupt falsely and fraudulently represented to Motores that the drafts will be paid upon their presentation to the bank and that it was solvent and financially able to meet payment of the drafts upon their presentation to the bank; that in reliance upon all and each of said representations and believing same to be true, Motores was importuned to deliver to the bankrupt physical possession of the five automobiles together with the paper titles thereto; and that it was expressly agreed that the vesting of title to the automobiles was conditioned upon payment of the purchase price and would become absolute only where and if the drafts were paid upon their presentation to the bank [R. 25-26, 27-28].

6. That the bank, where the drafts were presented for payment and dishonored, had knowledge of the above stated facts [R. 15]; that the bank *was negligent by* facilitating the bankrupt to defraud the appellant, *and that the bank was estopped* from impressing a lien upon the automobiles in question under its trust receipt certificates [R. 28] under Section 3543 of the California Civil Code.

It is to be noted that no responsive pleadings were filed by the bank to appellant's cross-petition, and the verity of the factual allegations therein set forth was not challenged by the bank's reclamation petition, or by the trustee's answer to the order to show cause [R. 29-31].

Jurisdictional Statement.

1st. On July 2, 1953, Erbel, Inc., dba Bi-Rite Auto Sales, filed a voluntary petition in bankruptcy in the United States District Court for the Southern District of California, Central Division [R. 3], and was on the same day [R. 6] adjudicated a bankrupt.

2nd. On July 29, 1953, the bank [R. 7-12] filed a petition in said bankruptcy proceedings to reclaim certain automobiles and to recover from the trustee a sum in excess of $500.00.

3rd. On August 3, 1953, Motores filed herein its answer, containing affirmative defenses, and its cross-petition [R. 14-29], in which it claimed the ownership of and title to five of the automobiles in question. The trustee likewise filed his answer [R. 29-31] to the bank's petition on the same day.

4th. A hearing upon the "three-cornered controversy" [R. 37] was commenced in the afternoon of August 13, 1953 [Findings, R. 59] and during the course of said hearing, two stipulations were entered into between the interested parties providing that the trustee proceed to sell the automobiles described in the bank's reclamation petition and to impound the sale proceeds subject to the orders to be made by the Referee in respect thereto [R. 32-36].

5th. After the hearing was concluded and submitted, the Referee filed his Memorandum of Opinion [R. 37-52]. The findings of fact and conclusions of law and order were prepared and proposed by the bank, pursuant to the Referee's direction [R. 59-71], and objections thereto were made by Motores [R. 53-59]. The findings and conclusions of law as prepared by the bank, with slight

amendments, were signed by the Referee on January 27, 1954 [R. 71].

6th. Motores filed its petition for a review on February 6, 1954 [R. 71-82] challenging that portion of the Referee's order ordering payment to the bank of $8,262.87. Same was submitted on briefs on March 22, 1954, and the Court made its order [R. 88-89] on April 29, 1954, sustaining the Referee's order and adopting his findings of fact and conclusions of law. It is from this order of the Court that this appeal is taken.

Upon the above court orders, pleadings and on the facts hereinafter stated, this Court has jurisdiction of this appeal under the provisions of Section 24 of the Bankruptcy Act; the amount involved is in excess of $500.00.

Facts.

Appellant, Motores, is a duly organized corporation under the laws of Mexico, having its principal place of business at Mexicali, Mexico.

It is engaged in the sale of new and used automobiles. Before the incorporation of the bankrupt, its manager, Erwin G. Resnick, had bought used automobiles in Mexicali from Motores at wholesale and paid for same by check [R. 137]; and he was well known to Luken, the manager of Motores, before the organization of Resnick's bankrupt company [R. 128-129].

After the bankrupt was incorporated and in the latter part of 1952, Mr. Luken, the manager of Motores, had a conversation at Mexicali with Mr. Resnick, the manager of the bankrupt, with reference to the *selling* to the bankrupt of used automobiles. This conversation

took place in the presence of Ray Cowan and one Mr. Rodriguez, the car buyer for the bankrupt [R. 129-131].

Mr. Resnick there told Mr. Luken of the formation of the bankrupt company, and of his partnership with Mr. Cowan, and that they had all kinds of money; that they had Bank of America flooring plus a continuing guarantee of William D. Cowan, the father of Ray Cowan, of $100,000.00 at said bank [R. 140]; that the drafts for the purchase of automobiles will be paid immediately upon presentation to the bank; that the drafts would be considered the same as a check and they would be paid immediately upon presentation to the bank [R. 129-139 to 143-147]. Mr. Luken, who had done business before with Mr. Resnick, believed in and relied upon the representations made by Resnick with respect to their financial ability to pay immediately upon the presentation of drafts to the bank, and that the same would be so paid.

Resnick [R. 140] also told Luken that the titles to the automobiles were needed in order to bring the cars across the border into California, and to secure California registration so that with the pinks they could floor the cars with the bank to *pay the drafts immediately upon their presentation to the bank.* The sales were at all times intended as cash sales; and as each car was purchased, the bankrupt issued, over the signature of Mario Rodriguez, who was authorized by the bankrupt to sign drafts and to purchase the cars [R. 128 and 148-149], a purchase draft on the printed form of the bankrupt. The drafts on their face each fully described the automobile purchased and specified the purchase price thereof [R. 148]. *The drafts were all presented for payment through the Wilshire and La Brea branch of the bank, the same branch which floored the automobiles in question.*

The previously issued purchase drafts were all paid promptly upon presentation to the bank [R. 130] until in March and April of 1953, when the drafts in question were dishonored.

The bank had floored automobiles for the bankrupt [R. beginning p. 109] commencing sometime during the latter part of 1952; and same continued through the transactions here involved. The loans herein involved were made by the bank to the bankrupt, under its flooring arrangement, on the automobiles in question *while, and despite the fact that the unpaid purchase drafts in question were in the bank's possession.* [See testimony of Mr. Fort, beginning at p. 108 of R.]

Mr. Fort admitted upon cross-examination [R. 119-120] that he personally knew on May 19, 1953, that the drafts had not been paid; yet on this very day, Mr. Fort, assistant cashier of the bank, made a loan to the bankrupt of $4,925.00, which included the flooring of the two Chevrolets in question [R. 114]. *The bankrupt was not credited with this money until two days later, May 21st.*

The above admissions were elicited on cross-examination, while on direct examination [R. 116] Mr. Fort denied knowledge that the cars in question had not been paid for. We reserve further comment upon this subject until later on in the brief.

It is singular that the bank did not see fit to have the officials of its collection department testify at the hearing.

Possession of the 1951 Buick and the 1950 Oldsmobile in question were obtained from Motores by the bankrupt on March 6, 1953 and the two Chevrolets and the 1952 Buick on April 2, 1953. This was done upon the issuance

to Motores of the purchase drafts Exhibits A, B, C, D and E. When Motores delivered the three additional cars to Mr. Rodriguez on April 2, 1953 it was not aware that the previously issued March drafts [Exs. A and B], had been dishonored [R. 142-143]. In fact, Resnick told Luken on this very day that they had been taken care of.

The drafts Exhibits A and B were both dated March 6, 1953 which were presented for payment, in the regular course of business, to the bank on or about March 11, 1953, and were dishonored; on or about March 18, 1953, said two drafts were returned unpaid to the bank in Mexicali, Mexico, where Motores maintained its account; on March 28, 1953 the aforesaid drafts were forwarded for collection by Motores' bank to the aforesaid branch of the Bank of America and after again being dishonored, were returned to Motores' bank on May 19, 1953; Motores had no knowledge of and was not aware [R. 142-147] that the drafts issued under date of March 6, 1953, had been dishonored at the time it accepted the three drafts under date of April 2, 1953, Exhibits C, D, and E; the drafts, Exhibits C, D, and E, were presented for payment, in the regular course of business, to the said bank on or about April 7, 1953, the same were dishonored, and were returned unpaid on May 19, 1953.

When the drafts were issued and delivered to Motores, and as a part of the same transaction, it delivered to the bankrupt the Mexican registration papers and bills of sale to the automobiles described upon the face of the drafts for the purposes hereinbefore enumerated.

Motores Testified Without Contradiction That It Would Not Have Parted With the Automobiles in Question and With the Muniments of Title Thereto Had It Known That Said Drafts Would Not Be Paid Immediately Upon Presentation to the Bank [R. 141].

The dates upon which the bank made the loans to the bankrupt under the flooring arrangement upon the five cars in question are:

1951 Buick—April 6, 1953.

1950 Oldsmobile—April 8, 1953.

1952 Buick—May 9, 1953.

Two 1952 Chevrolets—May 19, 1953.

On all of the above dates the unpaid drafts were in the collection department of the same bank, who loaned the money to the bankrupt under the flooring arrangement. Drafts, Exhibits A, B, C, D, and E, each accurately described upon its face the automobile sold and specified the amount of the purchase price, and showed upon its face *that it was an automobile purchase draft.*

The 1952 Buick was sold by the bankrupt to one Mays and the trustee has realized from the sale of said Buick cash in the sum of $2,441.00; the Buick was then traded by Mays for a 1947 Mercury, which was thereafter sold by the trustee for a cash realization of $400.00.

At the same time when the bank loaned money upon the 1952 Buick, it also made a loan upon the 1950 Chevrolet, which was subsequently sold by the trustee. There was realized by him from said sale the sum of $1,341.32, and all of the aforesaid sums of money aggregating $3,782.32, are now in his possession and constitute the proceeds of said vehicles.

Pursuant to stipulation of the interested parties herein, the trustee was empowered to sell the remaining automobiles and impound the funds to await the decision of the Court, the total amount of cash herein involved being $10,355.14; the stipulation calling for a reasonable part of the proceeds to cover costs of sale, the rights of the respective parties to attach to the proceeds of said sales in the same manner and to the same extent as such rights attached to the said motor vehicles themselves.

There are other facts which we may desire to mention later in this brief, however, we believe the above stated facts give this Honorable Court a rather concise picture of the transaction.

Evidence Excluded and Stricken by the Referee.

1. Resnick, the manager of the bankrupt, was not permitted to answer the question put to him on cross-examination that he told Motores at the time the bankrupt purchased the three cars on April 2, that the drafts issued in March had all been paid [R. 130-132].

2. The testimony of Motores bearing on the bankrupt's fraud that enabled the bankrupt to acquire the automobiles in question without payment was stricken by the Referee and the District Judge on the ground that it was not binding on the bank [R. 138-139].

3. The testimony of Rodriguez to the same effect was also stricken by the Referee and the District Judge for the same reason, as was the testimony of Resnick [R. beginning with p. 147]. (See bank's motion to strike [R. 152] and the ruling of the Court granting this motion [R. 50-52; 70-71].)

Appellant contends that this testimony was binding on the bank because it served as corroborative proof of the *expressed intention* of Motores and the bankrupt that the sale transaction was a cash transaction, and not a credit transaction. It was also admissible upon the question of the bankrupt's fraud. (It is axiomatic that the hearsay evidence rule does not come into play if the issue is directed to proof *of intention.*) This testimony also fortified appellant's contention that the bank, *whose negligence was emplacent in the bankrupt's fraud, was estopped from denying that the sale transaction was a cash transaction, and from denying Motores' title to the five automobiles.*

Specifications of Error.

I.

The Court erred in failing to find and conclude that the delivery of the drafts in question, Exhibits A, B, C, D, and E, constituted conditional payments of the purchase price; that the failure to have said drafts paid upon their presentation in due course of banking business vitiated the sale transaction *ipso facto* and *ab initio;* that there was no sale, and that the title to said automobiles was thereupon vested in Motores by operation of law.

II.

The Court erred in failing to find and conclude that the bank had knowledge and notice by and through its employees in the collection and loan departments, that said purchase drafts were worthless and that title to said automobiles was vested in appellant, Motores; that when the bank floored the automobiles and made the loans to the bankrupt, it had knowledge of and was charged with notice that the automobiles were unpaid for, and that title

to the automobiles was vested in appellant, Motores; that the bank was put upon notice and inquiry, and the loan advances made by it to the bankrupt upon the automobiles in question were made at its peril; that the bank was in a position to protect the interests of appellant, Motores, and at the same time to protect itself in the loaning of the money to the bankrupt by first paying the drafts then in its possession or making the loan checks payable to Motores and the bankrupt; that the bank's failure to have the drafts paid out of the loans was a negligent act on the part of the bank, and Motores was an "innocent person" within the meaning of Section 3543 of the California Civil Code; and that the bank *is estopped from claiming a lien* on the Motores property.

III.

The Court erred in failing to find and conclude from the evidence that the automobiles in question were obtained by the bankrupt from Motores upon the bankrupt's false and fraudulent representations of facts as alleged in the cross-petition of appellant, Motores; that Motores parted with the possession of said automobiles and delivered the paper muniments of title to the bankrupt relying upon and believing in the truthfulness of said false representations, and that the bank was not an "innocent person" within the meaning of Section 3543 of the Civil Code of California.

IV.

The testimony bearing upon the aforesaid false and fraudulent representations made by the bankrupt to Mr. Luken, the manager of Motores (albeit made not in the presence of the bank) was binding on the bank for the reasons stated under the heading of "Evidence Excluded and Stricken" hereinabove.

V.

Although the Referee, and the District Judge on review, found and determined that the transaction between the bankrupt and Motores was "intended that the sales be sales for cash" [Finding XVII, R. 67], the Court erred in failing and refusing to rule that the transaction was a cash sale *both as to the bankrupt and the bank* and that the non-payment of the drafts upon their presentation had vested the title to said automobiles in Motores; that the sale was a conditional sale under Section 1762, Civil Code, and that the delivery of the cars and the muniments of titles and the payment of the drafts were concurrent conditions. [See objection to findings, II, R. 54.]

VI.

The findings of the Referee as confirmed by the District Court are repudiated by the record as specifically pointed out in Paragraph VIII of the petition for a review [R. 74-80] and in appellant's objections to said findings. [R. 53-59.]

VII.

The Court erred in concluding as a matter of law that Motores was estopped from claiming that it had title to the vehicles or their proceeds superior to the bank.

VIII.

That the Court erred in failing to make the following conclusions of law:

(a) That the physical delivery by Motores to the bankrupt of the vehicles together with the simultaneous delivery of the paper muniments of title to said vehicles, and the payment of the purchase price thereof, were all concurrent conditions and mutually dependent acts, and the

transaction was a cash transaction not only between Motores and the bankrupt *but also between Motores and the bank.*

(b) That the bankrupt's drafts [Exs. A, B, C, D, and E] constituted only a conditional payment of the purchase price. The failure of the bankrupt to have said drafts honored and paid upon their presentation to the bank for payment has vitiated the sale transaction *ab initio,* irrespective of the bankrupt's pretended honest intentions when the drafts were issued. *The payment of the purchase price by worthless drafts or checks is tantamount to payment by counterfeit money in species.*

(c) When a check or draft is issued to the seller for the purchase price, it is not a sale on credit, since the seller has a right to believe and rely that the purchase check or draft is not worthless and that it would be paid upon presentation.

(d) That the bank was not an "innocent person," and that it could acquire no better title than the bankrupt. The failure by the bankrupt to honor and pay its drafts rendered the sale a nullity, and the bankrupt had no interest in the vehicles which it could mortgage or pledge, and the bank's lien on the vehicles was void.

(e) That the acceptance by Motores of the bankrupt's purchase drafts cannot be tortured into an estoppel on the part of Motores against the bank. The drafts were deposited by Motores in the regular course of business, and the bank had actual knowledge that the drafts were unpaid, and that title to the vehicles was thereupon vested in Motores. That the flooring financing of the bankrupt *contemplated and included the payment of the drafts,* and the flooring financing and the payment of the drafts all

constituted a part and parcel of the same transaction, and the bank was charged with knowledge thereof.

(f) That the court erred in not concluding as a matter of law that the bank was charged with notice and put upon inquiry, since the unpaid drafts were in its possession at the time it made the loans under its flooring arrangement with the bankrupt.

IX.

The findings of the Court are contrary to and in conflict with the evidence in the case.

X.

The conclusions of law made by the Court are contrary to the law of the case.

XI.

The order of the Court granting relief to the bank is contrary to the law and the evidence.

XII.

The Court erred in sustaining the bank's objection to the following question propounded to Erwin J. Resnick:

> "Q. And you recall telling him that they had been?" [R. 130-131.] [See Court ruling at p. 132.]

The above quoted question referred in context to the fact that Resnick had told Luken on April 2, the date the last drafts were given, that the March drafts had all been taken care of.

XIII.

That the Court erred in granting the bank's motion to strike the testimony, and in ordering the testimony of Luken, Resnick and Rodriguez stricken [R. 70-71].

ARGUMENT.

POINT ONE.

The Sale of the Automobiles Here Involved Was a Cash Sale. The Delivery of the Automobiles and the Muniments of Title and the Payment of the Drafts Were Concurrent Conditions. The Sale Was a Conditional Sale Under Section 1762 of the Civil Code of California. The Bank Was Estopped From Denying Motores' Title.

The Referee in his Memorandum Opinion, in commenting upon the law of the case [R. 43] stated as follows:

> "1. In View of All the Circumstances, Title Did Not Pass From the Mexican Corporation to the Bankrupt. . . .
>
> The evidence indicates that the Mexican corporation and the bankrupt contemplated a sale for cash. It is true that no checks were given, but the drafts given were intended to be of a similar nature. The bankrupt represented and the Mexican corporation understood that the drafts would be paid upon their presentation to the Bank.
>
> The California law seems clear that where the terms of sale are cash, the title to the goods does not pass until payment of the price. Puritas Coffee & Tea v. De Martini, 56 C. A. 528, 206 P. 98. And where a check is give upon delivery, the sale is one for cash, and if the check is dishonored the title to the goods, as between the parties remains in the seller. South San Francisco Packing and Provision v. Jacobsen, 183 C. 131, 190 P. 628; Peerless Motor Co. v. Sterling Finance, 139 C. A. 621, 34 P. (2) 738; Clark v. Hamilton Diamond, 209 C. 1, 284 P. 915. See to the same effect: DeVries v. Ellison, D. C. Minn., 100 F. S. 781, affirmed C. C. A. 8,

199 F. (2) 677, (Iowa and Minnesota law); Engstrom v. Benzel, C. C. A. 9, 191 F. (2) 689, (Washington law); Johnson v. Robinson, C. C. A. 5, 203 F. (2) 135 (Texas and Oklahoma law). Where cattle are sold for cash and a draft is given for the purchase price, but the draft is dishonored, title as between the parties to the sale remain in the seller. Towey v. Esser, 133 C. A. 669, 24 P. (2) 853. We are not dealing here with a situation where a check or draft is given in absolute payment, Peerless Motor v. Sterling Finance, 139 C. A. 621, 34 P. (2) 738, in which event title passes even if the check or draft is not honored."

We agree that the above statement of the law is correct, but our complaint arises over the fact that the Referee did not follow through with this line of reasoning in his findings of fact and conclusions of law.

Believing that some extended quotations from the authorities herein relied upon may facilitate a clearer understanding of the argument that is to follow, same are set forth in the appendix.

We believe and urge that an automobile purchase draft in the form and language of Exhibits A, B, C, D, and E shows on its face a cash sale transaction under the reasoning in the following cases:

De Vries v. Sig Ellingson & Co., 100 Fed. Supp. 781, affd. in 199 F. 2d 677;

Engstrom v. Benzel, 191 F. 2d 689;

Engstrom v. Wiley, 191 F. 2d 684;

Johnson v. Robinson, et al., 203 F. 2d 135;

Towey v. Esser, 133 Cal. App. 669;

and other cases cited in appendix.

POINT TWO.

The Automobiles and the Muniments of Title Thereto Were Obtained From Motores Upon False and Fraudulent Representations, Which, Under the Law of California, Is Theft. Under Such Circumstances, Motores Never Parted With Title Thereto and Motores Was an "Innocent Person."

This fact is doubly emphasized when the last automobiles were purchased on April 2, 1953, and automobile purchase drafts issued as a means of payment. At this very moment, the March 6th drafts were in the bank's collection department unpaid, yet when Mr. Luken asked Mr. Resnick if all these drafts had been taken care of, Resnick's answer was that they had been. Resnick knew that his answer was false and upon this false statement he obtained three more cars.

In the early case of *Knapp v. Lyman,* 44 Cal. App. 283, Judge James, while a Justice of the Appellate Court, says that it is immaterial whether the automobile be obtained by larceny or by obtaining the property by false pretenses.

The case before this Honorable Court is only different factually from the *Knapp v. Lyman* case in that while the bank did see the pink certificates in the hands of the bankrupt, it made no inquiry as to how or why the bankrupt had obtained the muniments of title contrary to the terms of the drafts. It could have ascertained the true facts, which it could easily have done. Clearly, it was grossly negligent in not requiring the payment of the drafts covering the cars upon which it was loaning the money. It was negligent in accepting the pink certificates showing the bankrupt to be the owner, which was contrary to the facts shown upon the face of the drafts, without first making careful inquiry. It accepted them at its peril.

It must be remembered that the bank, upon its own motion, has caused the Referee to strike from the record any evidence which would show in any way the change in the procedure it followed under the terms of the draft. That so far as the record now stands as against the bank there was no change in the procedure to be followed under the terms of the drafts, yet, under the record, the bank without inquiry accepted the bankrupt as the owner of these cars, who, over its own signature was not supposed to have title until the cars were paid for in the amount shown in the respective drafts. Was this the act of a prudent and careful banker or was it downright carelessness?

It would seem that knowledge of possession of property accompanied by indicia of title is of little value to the bank, without proper inquiry, when it had in its possession the drafts given for the purchase price which clearly indicated that the delivery of the muniments of title was conditional upon payment of the purchase price.

See *Nathe v. Fred W. Gray Co.,* 75 Cal. App. 2d 682, at 686, and *Kamberg v. Springfield Nat'l Bank,* 103 A. L. R. at 306, above cited.

POINT THREE.

The Negligent Failure by the Loan and Collection Departments of the Bank to Honor the Drafts Out of the Funds Credited to the Account of the Bankrupt Under the Flooring Arrangement Was Imputable to the Bank. This Negligence Furnished Fertile Soil and Seed for the Bankrupt's Fraud on Motores, and the Bank Was Not an "Innocent Person" Under Section 3543 of the Civil Code.

This subject concerns the application of the well settled law of *respondeat superior and ostensible authority.* The opinion of the Referee indicates [see p. 49 of the R.] that this law was narrowly construed by the Referee.

In discussing this feature of the case, we do for the present put aside the fact (a) that Motores was precluded by the Referee to establish lack of negligence on its part and that it was an "innocent person" within the letter and spirit of Section 3543 of the California Civil Code, and (b) that the findings of the Referee that the bank was an "innocent person" was based wholly on testimony *which was stricken from the record on the bank's motion.* This point is discussed elsewhere in this brief. It suffices at this time to point out that the ruling of the Referee and of the District Judge on this issue does not in our judgment square with sound judicial reasoning and is somewhat quixotic.

Turning to the problem presented in the above captioned heading, we primarily draw the Court's attention to these uncontrovertible facts:

1. That the branch bank at which the drafts were made payable *was the same branch bank which loaned the bankrupt the moneys under the flooring arrangement.*

2. That the drafts were presented for payment *to the same branch bank.*

3. That it was *the same branch bank* that made the loans to the bankrupt under the flooring arrangement upon the automobiles clearly identified on the very face of the drafts.

4. That the unpaid drafts were in the possession of the same branch of the bank when the loans to the bankrupt were credited to its account under the flooring arrangement.

5. That the loan and collection departments of the bank were its duly authorized agents and employees in charge of the business of the bank.

6. That in each instance the transactions herein involved were had *with the bank* through its duly authorized agents and employees in the course of its regular banking business.

It seems to be well settled that the acts of the agents and the employees of the bank were binding on the bank and that their knowledge of the transaction in question was the knowledge of the bank itself.

This law seems to us to be elementary. The following California Code sections and California decisions are directly in point and establish the unbroken rule that knowledge of an agent is the knowledge of his principal when dealing with third parties. The referred to Code sections and decisions are cited in the appendix.

It would seem that it is Motores, and not the bank, who is the innocent party; and it is the bank who was negligent within the meaning of Section 3543 of the Civil Code of California. This is discussed more fully under A of this point.

COMMENT ON THE DECISIONS CITED BY THE REFEREE AT PAGE 49 OF THE RECORD.

It is respectfully submitted that the decisions cited by the Referee at page 49 of the Record in support of his position that the law of *respondeat superior* and ostensible authority does not apply to bank employees who are not bank officers or who occupy a managerial capacity are not in point.

Globe Indemnity v. Union and Planters' Bank & Trust, 27 F. 2d 496, involved an action by the bank on a fidelity insurance policy issued under the Tennessee law, the bank claiming the right to recover damages sustained by reason of the fraud and dishonesty of one of its vice-presidents. *This case did not involve the application of the law of respondeat superior and ostensible authority.* The defense was predicated on the major premise that the fraud of the vice-president *was not covered by the terms of the fidelity policy* for the reason that his fraud was open and well known to some of the tellers of the bank. The Court ruled in effect that the fact that some of the tellers had knowledge of the vice-president's dishonesty did not constitute a waiver of the provisions in the insurance policy, and that the loss sustained by the bank was covered by the policy.

Hartford v. All Night and Day Bank, 170 Cal. 538, involved an action by a depositor against the bank for its negligence in failing to honor his check drawn on *his commercial account. The evidence was undisputed that the depositor had no commercial account.* The Court ruled that for this reason the teller was justified in returning the check with the endorsement "Has no account," and that the bank was not negligent. Plaintiff's conten-

tion that the check should have been nonetheless honored by the bank for the reason that he had sufficient money in his savings account was rejected by the Court as unsound for the principal reason that plaintiff's passbook had not accompanied the check as it was required by the bank rules and regulations.

State v. Brown County Bank, 112 Neb. 642, 200 N. W. 866, was a receivership proceeding, wherein the defendant's correspondent bank filed a claim for payment of a certificate of deposit. The evidence revealed that the officers of the defendant bank had knowledge of the facts surrounding the execution of the certificate of the deposit, that the claim of the respondent's bank was a secured claim, and that it was entitled to its payment out of the guaranty fund. This case did not involve the application of the law of *respondeat superior* or of the agent's ostensible authority: It is evident that the ruling of the Referee was based on the following *dictum* which had not the slightest bearing on the decision.

> "As experienced bankers they know that credit slips pass through a large institution, such as claimant, *as part of the routine,* handled by clerks who have no part in the management of the bank, *and that in the regular course of business the entries would not be noted by the officers having the control and management of the institution.* The entries made by the clerks of claimant, who were merely charged with the ministerial duty of making entries, did not charge the bank with knowledge of the transactions, in the absence of any showing that these clerks imparted the knowledge they acquired to any officer of the bank, or that it was their duty so to do." (Emphasis ours.)

It is respectfully submitted that the instant transaction was not a routine transaction and that it did not consist of mere bookkeeping entries. With all due respect to the Referee and to the District Judge, we fail to figure out the applicability of this dictum to the factual situation at hand.

A. The Bank Was Not an "Innocent Third Person." It Is Not a Bona Fide Purchaser Dealing on the Faith of Appearances. The Facts Within the Knowledge of the Bank Put It Upon Inquiry and Upon Notice. It Was Charged With Notice That the Automobile Purchase Drafts, Exhibits A, B, C, D and E, Fully Describing the Five Automobiles Here in Question Were Unpaid at the Times It Loaned Money Thereon: the Very Wording of the Drafts Disclosed a Cash Sale Transaction.

We do not contend that the bank knew of the conversations between Luken, Resnick and Rodriguez or of their prior dealings with each other.

We do contend, however, that the bank had notice and knowledge of the five unpaid drafts, Exhibits A, B, C, D, and E, which were held by it in its collection department on the days that the loans in question were made; that it had knowledge of all the written contents of said drafts, and that said drafts were given for the purchase of the five automobiles described in finding 9 [R. 63].

The bank knew:

1st. That the bankrupt was engaged in the business of buying and selling used automobiles. [See testimony of Mr. Fort, beginning R. 108, who was assistant cashier of the bank and whose duties were in connection with automobile financing. He handled the account of the bankrupt.]

2nd. That the purchases of automobiles were made by the bankrupt from Motores. Mr. Resnick testified [R. 128].

> "Q. (By Mr. Utley): Now, you bought a good many automobiles from Mr. Luken of the Mexicali Motors prior to March and April of 1953, did you not? A. Oh, yes, sir.
>
> Q. And I will show you Creditor's Exhibit C for identification, and in the purchase of those automobiles did you always give a purchase draft similar to that? A. Yes, sir.
>
> Q. And do you recognize the signature on that draft? A. Yes, sir.
>
> Q. Who is that? A. Mr. Mario Rodriguez, and this is also one of our own drafts.
>
> Q. It is one of your own printed drafts signed by Mr. Rodriguez? A. Yes.
>
> Q. And he was authorized to sign those drafts? A. Yes, sir.
>
> Q. Now, were all the automobiles purchased from (53) Motores de Mexicali purchased on drafts of that type? A. Yes, sir.
>
> Q. And up until then—up until certain drafts that came in in March and April of 1953, were your drafts always paid promptly? A. Yes, sir."

Mr. Resnick later testified [R. 135] that he bought as high as 40 or 50 automobiles a month. He also testified, as noted above, that up until March and April of 1953, the drafts were always paid promptly.

3rd. That the bankrupt purchased said automobiles during this period of time by means of an "Automobile Purchase Draft" signed by Bi-Rite Auto Sales and payable through the Wilshire-La Brea Branch of the bank.

[See testimony of Resnick above quoted. Also the testimony of Mr. Luken beginning at R. 137.]

4th. That the five drafts in question were not paid promptly, as had been the custom prior to March, 1953, and that said five drafts were still in the bank, unpaid, at the times of the bank's loans upon these five automobiles. [See findings 2, 3, 4, and 5; R. 60, 61, 62. See also testimony of Mr. Fort, beginning R. 108, and particularly note R. 120-121 and 114.]

5th. That the drafts stated upon their face that certain documents (the muniments of title to the automobiles) would be enclosed; that contrary to this statement, however, these documents were not enclosed, but the bankrupt presented the same to the bank at the time it applied for the loan, that these drafts called for the delivery of the ownership certificate, the registration card and the Bill of Sale to the purchaser upon the payment of the draft.

6th. That Mr. Fort, the bank officer who made the loan upon the two 1952 Chevrolets in question [R. 114] admitted [R. 120-121] that he personally knew that the drafts were being returned, unpaid, on the day that the loan on these two cars was made (May 19, 1958); that the bankrupt was not credited with this loan of $4,925.00 on its account until May 21, 1953 [R. 114]. This admits of actual knowledge on the part of Mr. Fort.

Erroneous Findings.

In the light of the above facts, the Court clearly erred in finding 12 [R. 65] "that the bank had *no knowledge* that Motores and the bankrupt intended the sale of the vehicles to be cash sales." (Emphasis ours.)

The fact that the bank had knowledge that the purchase price had not been paid charged it with notice that the unpaid draft rendered the sale void.

Furthermore, the fact that the giver of the worthless draft appeared at the bank with the muniments of title to the automobiles in question when the unpaid draft stated in plain language that these documents would accompany the draft and be delivered to the maker of the draft upon payment of same, would present facts and circumstances so cogent and obvious that to remain passive would amount to bad faith. It would seem that any prudent person would question the reason for the variance between the directions in the draft and what was actually being done for fear the muniments of title presented might be stolen and/or obtained by trick and device or under false pretenses or representations. In fact they were obtained under false representations.

Contrary to finding 15 [R. 67] had the bank inquired of Motores it would have been advised of this fact as Mr. Luken testified.

That the drafts were to be paid immediately upon presentation, the same as a check. Also that Resnick told him on April 2, that all drafts had been taken care of, and upon the strength of this statement Luken let him have more cars.

That after they started with Bi-Rite [R. 139] he had a conversation with Resnick with respect to selling him cars; that Cowan and Rodriguez were present in Luken's office at Mexicali when the conversation took place in the

late part of 1952 or early part of 1953 [R. 140]; that Resnick told him that he was in partnership with Mr. Cowan and they had all kinds of money and Mr. Cowan had put up a guarantee with the bank, that they were going to buy the cars with those drafts and the drafts would be paid immediately on getting to the bank. "He told us they needed the titles in order to bring the cars across the border, bring them into California, and then take those papers into the Highway Patrol or the Registration Department here and get the pink slip, and with the pink slip they can floor the cars with the bank and *pay the drafts immediately upon presentation to the bank.*" That Luken believed the representations Resnick made with respect to "their financial ability to pay upon presentation, as he had done business with him before. That after being so informed Luken gave Resnick the title to the cars."

> "Q. If you had known that the drafts would not be paid immediately upon presentation, would you have parted with title to the cars? A. No, sir, because that is one thing I explained to him very clearly. We wouldn't give the titles unless we get the money." [R. 141.]

Resnick told Luken [R. 141] that he could consider the drafts the same as a check "and they would be paid immediately upon presentation to the bank," "they would be paid as soon as they were presented to the bank" [R. 142.]

Luken further testified [R. 142] that at the time he received the April drafts, he did not know that the two March drafts had not been paid. That the drafts had

been paid before. That he would not have parted with the title of the automobiles upon any other condition than prompt payment upon presentation. That "until we get this, that was the only time I knew that they were unpaid." [R. 143.]

That Luken saw Mr. Resnick on April 2d at the time "this last bunch of drafts were issued" and had a conversation with him [R. 146] at that time as to whether or not all the March drafts had been paid. And "Mr. Resnick said that he wanted to buy more cars, and I asked him how he was with the drafts. He said that everything had been taken care of. So that is why I didn't mind selling him more cars." [R. 147. See also testimony of Mr. Resnick at bottom of R. 130-131 in so far as he was permitted to testify.]

In the light of this testimony, if the bank had informed Mr. Luken that Resnick, in behalf of the corporation, was trying to borrow money on the cars sold in April and that neither the March 6th or April 2 drafts had been paid, is it not reasonable to assume that Luken would have informed the bank that money could only be borrowed upon the cars if the drafts were first paid?

Mr. Resnick's testimony is substantially the same as Luken's.

If this testimony had not been improperly stricken by the Court, what basis in the evidence is there for finding 15 [R. 67]?

POINT FOUR.

The Court Erred in Granting the Bank's Motion to Strike the Testimony of the Conversation Between Mr. Luken, Manager of Motores, and Mr. Resnick, Manager of the Bankrupt as Well as the Testimony of Mr. Rodriguez, the Buyer for the Bankrupt.

The Court also erred in its refusal to permit an answer to the following question:

> "Q. And do you recall telling him that they had been?" [R. 131.]

Erwin G. Resnick was first called as a witness by Motores, under Section 21-j [R. 127] of the Bankruptcy Act. He testified in part as follows:

> "Q. Well, any of the money that you got from the flooring of those cars didn't go to pay the drafts, did it? A. No.
>
> Q. Now, do you recall along about April 2nd when you came down to Mexicali to purchase a number of cars from Mr. Luken of the Mexicali Motors? A. Well, I don't recall the exact date. I know I went down to Mexicali.
>
> Q. At the time you were there do you recall his having asked you if all the drafts for the month of March had been taken care of? A. Yes.
>
> Q. And you recall telling him that they had been?" [R. 130-131.]

It will be observed that to the last question, bank's counsel made the following objection:

> "Mr. Fabian: I object to that on the ground that it is immaterial to any of the issues before this Court as to the (56) title to the vehicles." [R. 131.]

After some argument, the Court said:

> "I think you had better drop that line unless you can connect it with the bank in some way." [R. 132.]

Aside from the fact that the above testimony was all erroneously stricken [see motion of bank's counsel to strike, the Referee and counsel's remarks [R. 152]. See also findings and order R. 70, par. 6; R. 71, par. 5], it was prejudicial error to refuse the right of Motores to have an answer from Resnick as to whether or not he told Mr. Luken that all drafts for the month of March had been taken care of.

Mr. Resnick admitted upon examination that he was asked this question by Mr. Luken when he went to buy more cars and issued more drafts on April 2nd, but Motores was not permitted to find out what his answer was. Mr. Luken testified [R. 147] that he asked Mr. Resnick this question on April 2nd and Resnick's answer was that "everything had been taken care of. So that is why I didn't mind selling him more cars."

The bank by its objection above referred to takes the position that it is immaterial whether or not Mr. Resnick was able to get possession of both the automobiles and muniments of title thereto described in the April 2nd drafts by telling Mr. Luken an absolute falsehood, to-wit: that all March drafts had been paid or taken care of.

Isn't it material to the issues in this case whether or not Mr. Luken, manager of Motores, relying upon a false and fraudulent representation of Resnick parted with the possession and muniments of title to the automobiles described in the April 2nd drafts, or whether he parted with this property knowing the true facts?

See:

Nathe v. Fred W. Gray Co., 75 Cal. App. 2d 682 at 686;

Kamberg v. Springfield Nat'l Bank, 103 A. L. R. 306.

It is obvious from the record [see Motores' objections to findings R. 53; also Referee's directions R. 52], that counsel for the bank prepared the findings which were signed by the Court. Note particularly how Finding 12 [R. 65-66] tries but fails to bring home knowledge to Motores of the unpaid March drafts. Does not this finding clearly show that the bank and the Court thought this an important and material element in the case? Yet, the bank tried and succeeded in closing the lips of Mr. Resnick when he was ready to confirm Mr. Luken's statement that he had told Mr. Luken that all March drafts had been taken care of. This, of course, would be clearly a false statement upon the strength of which the bankrupt got possession of the 1952 Buick and the two Chevrolet cars [R. 63, finding 9] from Motores, and the bank through Mr. Fort loaned $4,925.00 on the two Chevrolets [R. 114] at a time Fort knew the drafts were being returned unpaid [R. 120].

Furthermore, would not Resnick's answer to this question have shed considerable light upon whether or not the bankrupt intended to fulfill the promise to pay the drafts immediately upon presentment at the time such promise was made. [See finding 13, R. 66, which is based entirely upon the stricken evidence.]

The only possible evidence which could have been the basis for the finding of the Court that "the bankrupt intended to fulfill his promise at the time it was made"

[see finding 13, R. 66], was the self-serving declaration of Resnick that he intended to pay the drafts at the time they were issued [R. 135]. *And this testimony was stricken.*

This finding, above quoted, of good faith on the part of the bankrupt was made notwithstanding the fact that we were refused the right by the court over the bank's objection, to show by Resnick's own statement, that Resnick on April 2, and at the time the last three cars in question were delivered to the bankrupt, falsely stated to Luken that all March drafts had been taken care of. [See Motores' objection to finding 13, R. 57].

The Bank Has Gotten Itself, and the Court, in an Untenable Position by Presenting and Urging the Making of Findings of Fact Favorable to the Bank Upon the Testimony of Resnick, Luken and Rodriguez Which Has Been Stricken. Finding No. 9 [R. 63] Is Based Upon Stricken Evidence.

What evidence is there other than that stricken by the Court upon which to base a finding of the physical delivery of the automobiles and muniments of title thereto from Motores to the bankrupt?

The drafts upon the face thereof indicate and show that the ownership certificate, the registration card and the bill of sale would accompany the draft.

The drafts are designated "Automobile Purchase Draft" then after the date there is the following printed language:

> "Upon presentation of this draft to the bank designated below FOR COLLECTION TOGETHER WITH the documents properly executed *indicated on the reverse hereof.*" Then follows the direction to pay to Motores the money designated in the draft—

On the reverse side is the following:

"(x) 1. Ownership Certificate.....
(x) 2. Registration Card.....
(x) 3. Bill of Sale.....
( ) 4. Lien Satisfied.....
( ) 5. Plates or affidavit of Non-Operation....."

So, in the absence of the stricken evidence, all we know, and insofar as the stricken evidence shows, all the bank ever knew was that the muniments of title were supposed to accompany the drafts which should have been sufficient to have put the bank or any prudent person upon inquiry and upon notice since the automobiles and the muniments of title could have been stolen. In fact, they were stolen under the definition of Section 484 of the Penal Code, since they were obtained under false and fraudulent representations and a phone call by the bank to Motores would have revealed this fact, and that the sale was a cash sale, and that it was understood that the drafts were to be paid immediately upon presentation to the bank, the same as a check, the finding 15 [R. 67] to the contrary notwithstanding.

See *Nathe v. Fred W. Gray Co.* and *Kamberg v. Springfield National Bank* above cited.

FINDING 10 [R. 64].

How did the Court know, in the absence of the stricken testimony, what the purpose of Motores was in delivering the Mexican registration papers and bills of sale to the bankrupt, etc? [See our objection to this finding R. 54-55-56, par. III.] Furthermore, the stricken evidence is

contrary to the above finding. Mr. Luken testified [R. 140-141]:

> "Q. What if anything did he say to you with respect to your delivering him immediate title to the cars? A. He told us they needed the titles in order to bring the cars across the border, bring them into California, and then take those papers into the Highway Patrol or the Registration Department here and get the pink slip, and with the pink slip they can floor the cars with the bank and pay the drafts immediately upon presentation to the bank.
>
> Q. And did you believe the representations he made to you with respect to their financial ability to pay upon presentation? A. Well, I believed him. We had done business with him before.
>
> Q. And did you—after his telling you that, did you give him the title to the cars as well as— A. Yes, sir.
>
> Q. If you had known that the drafts would not be paid immediately upon presentation, would you have parted with title to the cars? A. No, sir, because that is one thing I explained to him very clearly. We wouldn't give the title unless we get the money."

Resnick testified [R. 134-135]:

> "Q. And did you ever give Mr. Luken to understand why you wanted title to these cars when you got possession? A. So I could turn them into California title and floor them so I could pay them."

If the cars were to be floored, it was for the express purpose of paying the drafts and no other purpose.

Without repetition, substantially the same argument can be used as to findings 11, 14, 15 and 17. There is a lack of any evidence to support these findings since the testimony of Resnick, Luken and Rodriguez has been stricken upon the motion of the bank.

The conclusion of law 6 of the Court [R. 70] is as follows:

> "The motion of the Bank to strike the testimony relating to the conversations between the representative of Motores de Mexicali, S. A. and the representative of the bankrupt was proper and must be granted, so far as the Bank is concerned."

and paragraph 5 of the Order [R. 71] reads as follows:

> "That the motion of the Bank of America National Trust and Savings Association to strike the testimony pertaining to the conversations between the representative of the bankrupt and the representative of Motores de Mexicali, S. A. is granted."

We submit that this includes the testimony of Erwin G. Resnick, beginning R. 127; the testimony of Mario Luken, beginning R. 137; the testimony of M. R. Rodriguez, beginning at R. 147.

We contend that all of this testimony was material and vital to the issues herein and that it was prejudicial error to strike the same from the record.

Wilcox v. Salomone, 118 Cal. App. 2d 704 at 711.

We re-emphasize that without this evidence many of the Court's findings favorable to the bank are wholly unsupported by any evidence whatsoever. If the bank is not bound by this evidence, how, may we ask, can they use it in support of its position?

We would gladly copy this evidence in the brief if it would serve any useful purpose, but as we view the situation, all of the testimony of the three witnesses above named was stricken and it can be as conveniently read from the record as from this brief.

Conclusion.

In conclusion we respectfully submit that the wording of these automobile purchase drafts plainly directed the bank to pay to Motores the amount named therein as the purchase price of the automobile described on the face of each draft when the drafts were presented to the bank "with the documents, properly executed, indicated on the reverse side hereof," which documents were, of course, the muniments of title to the automobiles described thereon.

The bank knew, by this direction, that *each draft was to be paid* upon it having evidence that title to the automobiles was available for the bankrupt. So even though these documents did not accompany the drafts the bank knew that the bankrupt had these muniments of title (whether obtained rightly or wrongly) and there remained nothing more for Motores to do, or no reason why the drafts should not be paid immediately, and there was every reason why the bank should have required the payment of the drafts before permitting the money, which it loaned upon the automobiles, to get beyond its control.

It is respectfully urged that the judgment herein should be reversed, and that the funds in question be ordered paid to Motores.

Respectfully submitted,

ERNEST R. UTLEY,

Attorney for Appellant.

APPENDIX I.

In *DeVries v. Sig Ellison & Co.,* 100 F. Supp. 781 (which case was affirmed by the Eighth Circuit Court of Appeals in 199 F. (2) 677) the facts disclosed that one Brackey, not a party to the action, on April 18, 1950, purchased 33 head of cattle from plaintiffs at an auction sale in Buffalo Center, Iowa, and gave his check on a Lake Mills, Iowa bank for the purchase price of $5,567.77. In due course it was presented for payment to the bank on which it was drawn and on April 26, 1950, it was returned N. S. F. When the check was presented for payment, Brackey had on deposit a balance of $12.62. Promptly after purchasing the cattle, Brackey took possession of them, loaded them in trucks and forthwith transported them to South St. Paul, Minn. where he delivered them to the defendant for sale on the market. The plaintiffs had sold livestock to Brackey on many occasions over a period of several years, but his checks before had never been dishonored. The defendant likewise had sold livestock for Brackey over a period of several years, and on April 19, 1950, sold the consignment here involved, collected the sales price and remitted the proceeds to Brackey. The defendant was without knowledge of any defect in Brackey's title, thus the defendant put both the cattle and the proceeds beyond reach of the plaintiffs.

The record appears to be silent as to whether or not Brackey delivered to the defendants a bill of sale, shipping order, or any evidence of ownership or that defendant made any request for such evidence.

The question presented in this case is whether the plaintiffs or defendants shall bear the loss.

The contentions of plaintiff in this case are very much the same as the contentions of Motores and the contentions of defendants are similar to the bank's contentions here.

After pointing out that the state law would control in the determination of the questions involved, the Court says at page 784:

> "Where personal property is sold for cash on delivery and the purchaser pays by check on his bank, such payment is conditional, and the delivery of the property likewise is conditional; and, if the check on due presentation, is dishonored, the purchaser does not obtain title and the vendor may retake the property. A check is not payment when it is tendered by a debtor on his bank; it is a method of transferring the money from the debtor to the creditor. The delivery of the check and the acceptance of it are purely conditional acts, and if the check is dishonored, there is no accord and satisfaction of the debt. There is no presumption that a creditor takes a check in payment arising from the mere fact that he accepts it from his debtor. The presumption is to the contrary. Indeed, the delivery of a check to seller by purchaser is a representation that it is good and will be paid on presentation."

Judge Fee, speaking for this Court, in the case of *Engstrom v. Benzel,* 191 F. (2) 689, which involved the question of whether the subsequent payment (within four months of bankruptcy) of an N. S. F. check, given for the purchase of wheat, for cash, constituted a voidable preference, says at page 691:

> "Delivery and payments are concurrent conditions and mutually dependent acts. The inference to be drawn from the fact that a sale of fungible personal

property is made is that there is a cash transaction. In this case, it was expressly stated by the agent of the buyer to be a sale for cash. While it is stated that conclusive evidence of intention to waive performance of the condition of concurrent payment is the fact that delivery has been made without receipt of cash, it must be clear that the intention of the parties is a question of fact. Where, therefore, payment is evaded by the purchaser upon delivery as a part of a cash sale, the seller is entitled to recover the goods because the buyer only has a contract right until the price is paid. If a check is taken, it is conditional payment only. If the check is deliberately drawn upon a bank where there is no account of the buyer, the fraud would vitiate the transaction. If the buyer had given counterfeit money in specie to the seller and delivery was made in reliance thereon before discovery, the situation would be the same. Where a check is received for the purchase price, the provisions of the Negotiable Instruments Act, as well as the Sales Act, must be considered.

A seller has a reasonable time under all the circumstances to deposit the check. If, upon presentation, there are no funds and the check is refused, the seller has not retreated from his original intention and he has not extended credit. The failure of the bank to have funds on January 18, 1947, might have been accepted as proof of fraud and by Benzel, and he might then have demanded the return of the negotiable instrument covering deposit of the wheat in the warehouse. The fault in not having funds on hand was that of Chemurgy."

See also the companion case of *Engstrom v. Wiley,* 191 F. (2) 684 where the facts are similar and the questions of law substantially the same.

The transaction in *Johnson, et al. v. Robinson, et al.,* 203 F. (2) 135 involved the sale of cattle (66 head for $13,800.) sold and delivered in Oklahoma and immediately transported to Amarillo, Texas, and resold through a livestock auction company. A draft was issued in this case instead of a check and it was payable through a Texas bank. *The purchase-money draft in favor of the appellees was duly presented and payment refused.*

The livestock auction company had undoubtedly had business transactions before with the maker of the draft, one Johnnie Johnson, for when it sold the cattle for his account it applied *a portion* of the proceeds received from the sale upon a debt which he owed the company. The Court in this case held that appellants were not *bona fide purchasers,* and they did not become *innocent parties* by crediting *part of the proceeds of the sale* of appellees' cattle upon a pre-existing debt of the contemplated purchaser. The Court says:

> "We have noted no difference between Texas and Oklahoma with reference to the rule of law that controls this case, which is that where goods are sold for cash and delivered, and the vendor takes the vendee's check for the price, which on presentiment in due time is dishonored, the title does not pass and the vendor may reclaim the property from the vendee or from any other person who does not have any better equitable claim to it than the vendee."

California Law.

The case of South San Francisco Packing and Provision Company v. Jacobson, 183 Cal. 131 involved the sale of hogs in the State of Idaho where a worthless check was given and the hogs were finally resold in San Francisco.

In reversing the judgment of the Trial Court, the Supreme Court says:

> "In effect, this sale was distinguished from a sale on credit, payment to be made, as is customary in similar commercial transactions, by check, as it was not agreed that the check was to be received as absolute payment, and the delivery of the goods also was conditional, and the check, upon due presentation, was dishonored, title to the hogs remained in the seller. In Johnson etc. Co. v. Central Bank, 116 Mo. 558, [38 Am. St. Rep. 615, 22 S. W. 813], it is held that a check given for the purchase price does not constitute payment until the money is actually received by the vendor unless it is otherwise expressly agreed. In National Bank v. Chicago etc. Ry., 44 Minn. 224 [20 Am. St. Rep. 566, 9 L. R. A. 263, 46 N. W. 342, 560] it is held that where goods are sold for cash on delivery, and payment is made by check, such check is, in fact, payment only when the cash is received on it, and that there is no presumption that a creditor takes a check in payment from the mere fact that he accepts it from his debtor. The presumption is just the contrary. Such payment is only conditional or a means of obtaining the money. So, in Hodgson v. Barrett, 33 Ohio St. 63, [31 Am. Rep. 527], it is held that payment by check is a mere mode of making a cash payment; that it is conditional only, and if the check, upon due presentation, is dishonored the vendor may retake the goods from the purchaser.
>
> There is nothing in this record indicating that the original sellers intended to accept Jacobsen's check as absolute payment. True, they were to accept a check in payment for the hogs, but this is the usual method in cash transactions of any magnitude, and it is employed as a matter of convenience and to obviate the necessity of handling and transporting large sums

of money with its attendant risks. In the case of Comtoir d'Escompte v. Bresbach, 78 Cal. 15, [20 Pac. 28], it is said that the language of the manager of the plaintiff bank in stating that a check which was subsequently dishonored, was accepted in payment of the debt sued upon should not be construed as signifying anything more the provisional or conditional payment presumed by law, and is no evidence of absolute payment.

[2] The title to the hogs, therefore, as between the parties to the sale having remained in the original sellers, it follows, we have no doubt, that the fund in the hands of the plaintiff, the purchaser from Jacobsen, constituting part of the purchase price, belongs to the original sellers, Taylor & Rosecrans; and we also entertain no doubt that so far as the attaching creditor is concerned it has no better right to the fund than Jacobsen himself. (Ward v. Waterman, 85 Cal. 491, 508 (24 Pac. 930).)

It follows that the judgment should be reversed and it is so ordered."

The case of *Towey v. Esser,* 133 Cal. App. 669 involved the sale of cattle from Santa Margarita Land and Cattle Company in San Luis Obispo County, California, to one Esser, a cattle buyer on or about June 17, 1931. Esser had bought cattle from the company three times before within the preceding two years. He was known to the ranch superintendent, Miller, who transacted the business with Esser on this particular occasion. Miller was authorized to sell the cattle for cash and he so informed Esser. A check was to be delivered to the seller when the cattle were weighed out. The cattle were weighed and Miller delivered to Esser a "brand certificate" which was necessary, under the law, for Esser to present to the railroad

company before it would accept the cattle for shipment. The cattle were driven by the seller to the loading corrals of the Southern Pacific Co., Santa Margarita, and on Saturday, June 20, 1931, were loaded into three cars and billed by Esser to Pacific Live Stock & Comm. Co., Union Stock Yards, Los Angeles, "for the account of John Schwab." Immediately after the cattle were loaded the amount of the purchase price was computed by Miller, and Esser delivered to Miller *a draft* for $4,475.91 drawn on the consignee, Pacific Live Stock & Comm. Co., Union Stock Yards, Los Angeles, and signed "John Schwab by H. Esser." Esser then wrote out *a bill of sale,* in simple form, *which Miller signed and handed back to Esser.*

Shortly after receiving the draft, Miller forwarded same, with report of sale, to the San Francisco office of the company and the draft in due time was deposited in a San Francisco bank *for collection.* It arrived at the correspondent bank in Los Angeles the next day and at 2:10 P.M. of the same day was presented for payment to the Pacific Live Stock & Comm. Co. However, in the meantime, the cattle arrived and were resold about noon of that day by the Pacific Live Stock & Comm Co. and the proceeds of the sale attached by Towey in an action filed earlier in the day against Esser. The payment of the draft was refused.

The Trial Court awarded judgment in favor of Towey upon the legal theory that title to the cattle passed to Esser unconditionally and absolutely upon the simultaneous delivery of the cattle and the draft in Santa Margarita on June 20, 1931, despite the admitted fact that it was a sale for cash and that the draft given in lieu of cash proved to be utterly worthless.

In answer to the above, the Appellate Court says:

"In so holding the decision of the trial court, in our opinion, is, as appellant contends, in direct conflict with and contrary to the law declared in the case of South San Francisco Packing & Provision Co. v. Jacobsen, 193 Cal. 131 [190 Pac. 628], which involved facts almost identical with those of the present case. . . .

True, as pointed out by the court therein, where the seller expressly agrees to accept a check or bill or note, as absolute payment, title to the goods will pass upon the delivery of the goods and the acceptance of such check or bill or note, regardless of whether the paper is honored on due presentation thereof; but, as the court goes on to say, where goods are sold for cash on delivery and payment is made by check, such check is, in fact, payment only when the cash is received on it; and there is no presumption that the seller takes the check as absolute payment merely from the fact that he accepts it from the buyer, the presumption being, says the court, just to the contrary, citing National Bank of Commerce v. Chicago, etc. Co., 44 Minn. 224 [46 N. W. 342, 560, 20 Am. St. Rep. 566, 9 L. R. A. 263]; Hodgson v. Barrett, 33 Ohio St. 63 [31 Am. Rep. 527]; Johnson-Brinkham Co. v. Central Bank, 116 Mo. 588 [22 S. W. 813, 38 Am. St. Rep. 615]. . . .

And so in the present case, the undisputed evidence shows that the sale of the cattle to Esser was to be a sale for cash as distinguished from a sale on credit, and that there was no understanding or agreement whatever that the draft given by Esser was to be accepted as absolute payment. On the contrary, the evidence shows it was taken merely in accordance with the custom followed in similar commercial transactions. Therefore, under the authorities above

cited, as between the parties to the sale, title to the cattle remained in the seller dependent upon the payment of the draft; and since the draft was dishonored the seller was entitled, as in the Jacobsen case, to the proceeds from the sale of the cattle as against the attaching creditor, who had no better right thereto than Esser himself would have had.

Moreover, in the Jacobsen case, *supra,* it was strongly indicated that if the check were given for the purpose and with the intention of perpetrating a fraud, the sale would have been void both as to Jacobsen and his attaching creditor. The court went on to point out, however, that after the issuance of the check and before its presentation for payment three days later, Jacobsen on two occasions had more than sufficient money on deposit to meet its payment, which the court stated, coupled with presumption of innocence and fair dealing, furnished some foundation for finding of the trial court against fraud. But in the present case the evidence shows without conflict that Esser clearly intended to and did in fact perpetrate an absolute fraud. He falsely represented that Schwab was the real purchaser of the cattle, he gave a spurious draft in payment therof, purporting to be the draft of Schwab, and he shipped the cattle under Schwab's name to the Los Angeles commission house for the account of John Schwab; whereas, as stated, Schwab knew nothing whatever about the transaction. It is evident, therefore that the seller here established a much stronger case in its favor than did the sellers in the Jacobsen case."

The next California case, Peerless Motor Co. v. Sterling Finance Corp., 139 Cal. App. 621, is an automobile case where one, Bowe, gave the owner of the automobile a

worthless check in payment of the automobile. The Court says, at page 624:

> "The finding of the court that the plaintiff was the owner and entitled to the possession of the Peerless sedan automobile is adequately supported by the evidence. It appears that the title to the machine did not pass to Bowe. He was not the agent of the respondent. The machine was never actually delivered to him. The appellant is charged with notice that Bowe was not the owner of the machine. It is apparent the sale to Bowe was intended to be for cash, subject to the payment of his check which was dishonored for lack of funds. The certificate of ownership was issued to Jeanette M. Brady by the motor vehicle department of California without the knowledge or consent of the respondent. No *indicia* of title was executed or delivered by the respondent.
>
> The question as to whether title to personal property passes to a proposed purchaser by the mere delivery thereof depends upon the intention of the parties, which is to be determined by the circumstances of the transaction. The mere acceptance of a check in payment for personal property, subject to the payment of the chck, does not pass title when the check is subsequently dishonored and is not paid. (South San Francisco Pkg. etc. Co. v. Jacobsen, 183 Cal. 131 [190 Pac. 628]; Towey v. Esser, 133 Cal. App. 669 [24 Pac. (2d) 853].)
>
> The appellant contends that the conduct of the respondent estops it from questioning the title to the Peerless sedan machine. We are of the opinion the record discloses nothing in the conduct of respondent with relation to the transaction which estops it from asserting title thereto."

The case of Clark v. Hamilton Diamond Co., 209 Cal. 1 involved the sale and delivery of a diamond ring. The ring was first sold by plaintiff to Harry Justice, who "fraudulently gave a worthless check in payment therefor". The ring changed hands several times either by trade or sale and finally one, Friedman, sold the ring to the defendant Cohen dba Hamilton Diamond Co. who purchased it without knowledge of the transaction between plaintiff and Justice. Cohen appealed from an adverse judgement claiming that he was a bona fide purchaser of the ring without knowledge of defect of title.

In short, the Trial Court found that the sale to Justice was a cash sale; that plaintiff did not waive immediate cash payment and gave no *indicia* or muniment of title to anyone when the sale was made; and in obtaining the ring, Cohen did not rely upon any evidence of title in his grantor. The Court says at page 3:

> "From these findings it follows that the sale of the ring by plaintiff to Justice was, in effect, a sale for cash, as distinguished from a sale on credit, payment to be made, as is customary in similar transactions, by check. As it was not agreed that the check was to be received as absolute payment, the delivery of the ring to Justice was also conditional, and, the check being dishonored upon due presentation, title to the ring remained in plaintiff. (South San Francisco Packing etc. Co. v. Jacobsen, 183 Cal. 131, 135 *et seq.* [190 Pac. 628].) [2] It seems to be very definitely settled by that case and the authorities there cited that, as between the parties, upon the check being dishonored, the seller is clearly entitled to

resume possession of the property. *As between the original seller and third parties, the relation is to be determined by what the vendor has done or has not done.* In this case the plaintiff gave to Justice, the original purchaser, no INDICIA of title other than the possession of the property. He followed the due course of business in attempting to secure payment of the check, and took immediate steps to recover the ring upon learning that the check was worthless. Appellant has not made it appear, in fact, apparently does not claim, that he was injured by any delay on plaintiff's part. It is very clear from the findings that in this case the plaintiff did not transfer the possession of the ring to Justice with a power to dispose of it. Therefore, section 1142 of the Civil Code does not apply, and any executed sale by Justice, or those purporting to claim under him, does not transfer plaintiff's title to them. (Pacific Acceptance Corp. v. Bank of Italy, 59 Cal. App. 76, 80 [209 Pac. 1024.]) [3] There was no other INDICIA of ownership than mere possession. That was not enough. There must have been some act or conduct on the part of the real owner whereby the party selling was clothed with apparent ownership or authority to sell, and which the real owner will not be heard to deny or question to the prejudice of the *innocent third persons dealing on the faith of such appearances.* (Levi v. Booth, 58 Md. 305 [42 Am. Rep. 332].)" (Emphasis ours.)

It will be observed that the cases cited above make no distinction between drafts and checks as a valid means of cash payment.

APPLICABLE CALIFORNIA CIVIL CODE SECTIONS.

Section 1762 C. C. provides:

"DELIVERY AND PAYMENT ARE CONCURRENT CONDITIONS. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession to the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods."

Section 1772 C. C. defines an unpaid seller as one: when

"(a) When the whole of the price has not been paid or tendered.

(b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise."

Section 1773 C. C. Prescribes remedies of an unpaid seller. As shown by the cases herein cited, said remedies are not exclusive, but are only cumulative.

Section 1781 C. C. speaks of the remedy of rescission. Said remedy is not exclusive, but is only cumulative. As shown by the authorities cited herein, the seller is entitled to restitution of his property without first exercising the right of rescission, if and when the buyer's purchase check or draft is dishonored.

APPENDIX II.

Doctrine of Estoppel.

The cases generally recognize the right of *innocent third persons* who acquire the property for value and *without notice* to rely upon estoppel against the seller where the seller has clothed the fraudulent purchaser with *indicia* of ownership in addition to possession of the property. *But such third persons must act in good faith.*

Nathe v. Fred W. Gray Co., 75 C. A. (2) 682.

Freitas v. March, 70 C. A. (2) 711.

De Vries v. Sig Ellingson & Co., 100 F. Supp. 781 at 787.

Clark v. Hamilton Diamond Co., 209 Cal. 1, at p. 3, para. (3).

Peerless Motor Co. v. Sterling Finance Corp., 139 C. A. 621 at 624.

The Court in the case of Nathe v. Fred W. Gray Co., 75 C. A. (2) 682 at 686 says:

> "This is upon the principle that a party is not bound in transactions of this character either to anticipate or take precaution against the commission of a crime by which another may be deceived; that where it is through the instrumentality of a criminal act that the wrong is accomplished, it is the crime and not the negligent act which is the proximate cause or injury; and in such a case the maxim that where one of two innocent persons must suffer from the wrongful act of another, the loss must fall upon the one making the act possible, has no application. (See, also, Miller v. Citizens Nat. Trust etc. Bk., 1 Cal. App. 2d 470, 477 [36 P. 2d 1008].)"

In some cases, the courts have recognized as applicable the maxim announced in Section 3543 of the Civil Code, which provides:

> "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer."
>
> Johnson, et al. v. Robinson, et al., 203 F. (2) 135 at 136.

The Court, in the case of De Vries v. Sig Ellingson & Co., 100 F. Supp. 781, defines the elements of estoppel at page 787. It says:

> "The essential elements of estoppel are. (1) Ignorance of the facts of the party claiming estoppel; (2) misrepresentation or silence concerning the matter where it was a duty to speak amounting to misrepresentation or concealment of a material fact; (3) action by the party relying on the misrepresentation or concealment; and (4) damages resulting if the estoppel is denied. Nelson v. Chicago Mill & Lumber Corp., 8 Cir., 76 F. 2d 17."

See also Frank v. Claus, 121 C. A. (2) 777 at p. 786, para. (4).

The Court, in this case as in other cases herein cited, points out that in order that the real owner of personal property may be estopped from asserting his title against a person who has dealt with one in possession *in faith* of his apparent ownership, it is the general rule that something more than mere possession and control is necessary. The authorities indicate that possession must be accomplished by indicia of title.

The California Supreme Court, in Clark v. Hamilton Diamond Co. above cited, at page 3 (3) used the following language:

> "There was no other INDICIA of ownership than mere possession. That was not enough. There must have been some act or conduct on the part of the real owner whereby the party selling was clothed with apparent ownership or authority to sell, and which the real owner will not be heard to deny or question to the prejudice of the *innocent third persons dealing on the faith of such appearances.* (Levi v. Booth, 58 Md. 305 [42 Am. Rep. 332].)" (Emphasis ours).

In other words, the third persons must be "innocent" and they must deal "on the faith" of such appearances. They cannot ignore facts before their eyes which show a cash transaction. They are not "innocent" if they are negligent.

It is the contention of appellant, Motores, that the bank was not an "innnocent person" nor did it act prudently or "on the faith" of such appearances as defined in these decisions.

In other words, the bank had notice, and was charged with notice, and was put upon inquiry by the very nature and contents of the unpaid "automobile purchase drafts" which it held and was holding in its collection department at the very time it made the loans upon the automobiles plainly described upon the face of the draft.

Also, Judge Fee, speaking for the Court in the case of Engstrom v. Wiley, 191 F. (2) 684 at 688 recognizes that: "Where the rights of *innocent third parties* enter," the technical ground of defense "is estoppel and not waiver." (Emphasis ours).

APPENDIX III.

Section 2330 of the California Civil Code reads as follows:

"Principal, How Affected By Acts of Agent Within the Scope of His Authority. An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal." "Notice to Agent, When Notice to Principal, As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other." Section 2332, California Civil Code.

"For Acts Done Under A Merely Ostensible Authority. A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof." Section 2334, California Civil Code.

"Principal's Responsibility for Agent's Negligence or Omission. Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willfull omission to fulfill the obligations of the principal." Section 2338, California Civil Code.

These code sections apply to corporations as well as individuals.

Jefferson v. Hewitt, 103 C. 624, 37 Pac. 638.

In the case of Christie v. Sherwood, et al., 113 Cal. 526, the facts were: Plaintiff, a depositor of defendant bank, was asked by one Arnold, the cashier of the bank, if he wanted to lend money to the defendant, Sherwood, to be secured by a first mortgage on Sherwood's property. In accordance with the cashier's request, plaintiff made a loan to Sherwood and took a first mortgage on Sherwood's property as security. *The president and directors of the bank had no actual knowledge of this transaction,* and by reason thereof, the bank made a loan to Sherwood, taking the same property as security. The bank's mortgage was recorded first and plaintiff's mortgage was subsequently recorded. The Court held that plaintiff's mortgage had priority over the bank's mortgage for the reason that Arnold was acting within the scope of his authority, and his knowledge of plaintiff's mortgage was imputed to the bank. The Court said:

> "The knowledge of its cashier of the prior mortgage to Christie was the knowledge of the bank"

In First Nat. Bank v. Reed, 198 Cal. 252, the Court said at page 258:

> "In the absence of any evidence on the point, it would be assumed that Wickstrom communicated to his principal his knowledge of any facts material to the transaction."

The case of Vanciel v. Kumle, 26 C. (2d) 732, at 734, says:

> "The knowledge of Rocca, an agent acting within the scope of his authority, is the knowledge of his principal."

Again, in the case of Williams v. Hasshagen, 166 Cal. 386 at 393, a bank case, the Court says:

> "His knowledge is presumptively that of the bank, and it makes no differnce that he took some personal benefit from the fraud."

In Culley v. New York Life Ins. Co., 27 C. (2d) 187 at 192, the Court declared:

> "A principal is chargeable with and is bound by the knowledge of, or notice to, his agent received while the agent is acting within the scope of his authority and which is with reference to a matter over which his authority extends. (citing cases) The fact that the knowledge acquired by the agent was not actually communicated to the principal, as contended by appellant, does not prevent operation of the rule. The knowledge is, in law, imputed to the principal. The agent may have been guilty of a breach of duty to his principal, yet the knowledge has the same effect as to third persons as though his duty had been faithfully performed. The agent acting within the scope of his authority, is, as to the matters existing therein during the course of the agency, the principal himself. (citing cases) An agent's knowledge of the content of a contract is imputed to his principal. (citing cases) This rule of law is not a rebuttable presumption. It is not a presumption at all. It is a rule which charges the principal with the knowledge possessed by his agent."

See also: Columbia Pictures Corp. v. DeToth, 87 C. A. 2d 620 at 630-631.

Maron v. Swig, 115 C. A. 2d 87 at 90.

Eagle Indemnity Co. v. Industrial Accident Comm., 92 C. A. (2d) 222 at 228.

APPENDIX IV.

The Obtaining of Property by False and Fraudulent Pretenses.

Section 484 Penal Code of California defines theft as:

> "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft."

It is important to keep the above section of the Penal Code in mind in connection with the language hereinabove quoted in the case of Nathe v. Fred W. Gray Co.

Also, a person defrauded of his property by the issuance of a worthless check by the purchaser may recover it.

Engstrom v. Benzel, 191 (2) 689.

In the case of Kamberg v. Springfield Nat'l Bank, 103 A. L. R. 306 (see annotations at 310) at page 309, the Court says:

> "If an insolvent has obtained money or property by fraud or other tort, that money or property is not properly part of the assets of his estate, and may be reclaimed from the trustee in bankruptcy. Bussing

v. Rice, 2 Cush. 48; Watson v. Silsby, 166 Mass. 57, 43 N. E. 1117; Donaldson v. Farwell, 93 U. S. 631; 23 L. ed. 993; In re New York Commercial Co. (C. C. A.) 228 F. 120; In re Horigan Supply Co. (C. C. A.) 2 F. (2d) 791, Manly v. Ohio Shoe Co. (C. C. A.) 25 F. (2d) 384, 59 A. L. R. 413; California Conserving Co. v. D'Avanzo (C. C. A.) 62 F. (2d) 528; Sternberg v. American Snuff Co. (C. C. A.) 69 F. (2d) 307. Likewise, if the insolvent restores it before bankruptcy occurs, there is no preference, for there is no diminution of assets. Montgomery v. Bucyrus Machine Works, 92 U. S. 257, 23 L. ed. 656; Hough v. Atchison, Topeka & Santa Fe Railway Co. (C. C. A.) 34 F. (2d) 238, 240, 241; Fisher v. Shreve, Crump & Low Co. (D. C.) 7 F. (2d) 149.

But that principle applies only so long as the money or property can be traced and found, either in its original or in an altered form, in some particular assets."

If as stated above such property may be reclaimed from a trustee in bankruptcy, it can likewise be reclaimed from a bank under the facts in this case.

APPENDIX V.

The Conversations and the Agreements Between the Seller and Buyer Are Important and Material, and Admissible in Evidence, in a Case Involving a Third Person Claiming Title to the Property.

1st. The cases which we have heretofore cited in the appendix all point out the importance of knowing what was said and done at the time of the transaction between the seller and buyer for the purpose of arriving at a determination of whether or not the sale was intended to be and was in fact a cash sale. This is a very important issue in this case.

2nd. Such conversations, facts and circumstances are also absolutely essential in order to determine whether or not the automobiles in question were obtained from Motores under false and fraudulent representations of the buyer. This is likewise an essential issue in this case, and the record discloses that the attorney for the trustee recognized it as such.

> "Mr. McDonnell: I think that as to the Trustee's interest, as Mr. Utley is pointing out, I think probably the testimony is relevant and admissible, and that is why I [66] haven't objected." (R. 139)

3rd. Without the testimony, which the Court has stricken (R. 70-71) there is absolutely no evidence in the record to support many of the findings which the Court has made favorable to the position of the bank.

In the case of Wilcox v. Salomone, 118 C. A. (2) 704 at 711, the Court says:

> "Appellants next contend that the court erred in admitting in evidence over their objection certain oral and written declarations made by respondent's de-

ceased wife relating to the nature of the transaction, and made out of the presence of appellants. These declarations were either testified to by witnesses to whom they were made, or introduced into evidence in their written form. They were of the same nature and all supported the contention that a loan and a mortgage were intended by the appellants in the transaction in question. Thus, they would be 'self-serving declarations,' and hearsay. They would be self-serving since they were in support of the interest of respondent and the deceased declarant. (10 Cal. Jur., Evidence, §311.) They would be hearsay since they rest upon the veracity and competency of some person other than the witness offering them. (10 Cal. Jur., Evidence, §288; Code Civ. Proc., §1845) Declarations of a person deceased or a party to the action, made in the absence of the opposite party sought to be bound by them, which declarations are in support of the party's or declarant's own interest, are not admissible in favor of those who claim rights, which the declaration would maintain. (10 Cal. Jur., Evidence, §§311, 331.) However, there are exceptions to the hearsay rule."